

[Filed 10-14-08, 4 p.m.]

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DALLAS PORK, LLC, and LINCOLN 1
PORK, LLC,

Petitioners,

v.

STATE OF IOWA, ex rel., IOWA
ENVIRONMENTAL PROTECTION
COMMISSION and the IOWA DEPARTMENT
OF NATURAL RESOURCES,

Respondent,

AA NO.

OV 7404

PETITION FOR JUDICIAL REVIEW

FILED
POLK COUNTY IA
OCT 14 PM 4:00
JUDICIAL DISTRICT COURT

For their Petition for Judicial Review, Petitioners Dallas Pork, LLC and Lincoln 1 Pork,
LLC state:

NATURE OF ACTION

1. This is a proceeding for judicial review of the August 19, 2008 decision by the Iowa Environmental Protection Commission to deny construction permits for confinement feeding operation structures, which decision constitutes final agency action pursuant to Iowa Code Section 17A.19 (1999) and Iowa Rule of Civil Procedure 331 et seq.

PARTICULAR AGENCY ACTION APPEALED FROM

2. The particular agency action appealed from is the August 19, 2008 decision by the Iowa Environmental Protection Commission to deny construction permits for Petitioners, which decision constitutes final agency action pursuant to Iowa Code Section 17A.19 (1999) and Iowa Rule of Civil Procedure 331 et seq.

PARTIES

3. Dallas Pork, LLC and Lincoln 1 Pork, LLC ("Petitioners"), are Iowa limited liability partnerships.

4. Respondent Iowa Environmental Protection Commission ("Commission") is an agency as defined by Section 17A.2 (1), Iowa Code.

5. Respondent Iowa Department of Natural Resources ("Department") is an agency as defined by Section 17A.2 (1), Iowa Code.

JURISDICTION AND VENUE

6. This court has jurisdiction over petitions for judicial review. Section 17A.19, Iowa Code.

7. Respondents Department and Commission are agencies of the State of Iowa. Iowa Code § 17A.19(2) provides venue for a proceeding for judicial review to be in Polk County District Court. Additional facts upon which jurisdiction and venue are based upon are set out below.

GROUND UPON WHICH RELIEF IS SOUGHT

Procedural and Factual Background

8. On May 15, 2008, Petitioners filed applications with the Iowa Department of Natural Resources for the construction of new confined animal feeding operations in Dallas County, Iowa.

9. The applications complied with Iowa law in all material respects.

10. The applications included a Master Matrix scoring for each Petitioner that was accurate in all material respects.

11. The Master Matrix score for the Petitioners' sites exceeded the score necessary to pass.

12. On June 5, 2008, Field Office #5 e-mailed the Ag Site Survey Report for the Petitioners' sites to the Department's main office stating that the proposed facilities appeared to comply with the siting requirements of Chapter 459 of the Code of Iowa and Chapter 567 IAC 65(459) and that on-site observations and/or measurements documented compliance with the siting requirements for the proposed facilities.

13. There is no deficiency with regard to the Petitioners' proposed facility site distances.

14. On June 26, 2008, Jim Stricker, Supervisor of Field Office #5 sent letters to Robert Manning, Jr. stating that the manure management plan for the proposed facilities had been reviewed for completeness and accuracy and that it was approved.

15. There is no deficiency with regard to Petitioners' manure management plans and the manure management plans have been properly approved by the Department.

16. On May 15, 2008, Robert Palla, P.E., issued a letter to the Dallas County Board of Supervisors indicating that Petitioners' permit applications had been filed and providing that the Supervisors had until June 13, 2008 to provide the Department with a recommendation.

17. On May 15, 2008 The Deputy Auditor for Dallas County executed "County Verification Receipt of DNR Construction Permit Application" documents stating that the County had on that date received a complete copy of Petitioners' construction permit application documents.

18. Petitioners have paid all required fees, provided notice to all required parties, and filed all required documents in support of the requested permits.

19. On July 1, 2008, the Dallas County Board of Supervisors requested a thirty-day extension to reassess the Master Matrix for the Petitioners' permit applications.

20. On July 3, 2008, Wayne Farrand, Supervisor of the Wastewater Engineering Section for the Department provided the Dallas County Board of Supervisors with a thirty-day continuance for the evaluation of the Petitioners' applications.

21. In an undated letter from Bob Ockerman, Chairman of the Dallas County Board of Supervisors, shown as received by the Department on July 16, 2008 by mail and July 11, 2008 by fax, Mr. Ockerman stated that the Dallas County Board of Supervisors "reevaluated" the permit applications using the Master Matrix. In that letter, The Dallas County Board of Supervisors recommended disapproval of both applications based on "community input," but stated in that letter that it "does not challenge the points claimed on the Master Matrix."

22. Minutes from the Dallas County Board of Supervisors meeting held on June 10, 2008 indicate that "Assistant Planner Samuel Larson reported that the County's review was identical to that of the applicant."

23. On July 14, 2008, Robert Palla, signing on behalf of Wayne Farrand, Supervisor of the Wastewater Construction Section of the Department, issued preliminary determinations that the Petitioners' sites met the legal criteria to be issued construction permits for new swine confinement feeding operations to be located Dallas County, Iowa. The permits would authorize construction of Petitioners' confinement feeding operation structure as described in the draft permits.

24. In issuing the preliminary determinations on July 14, 2008 the Department did not find any legal basis to withhold the permits from Petitioners.

25. There is no legal basis to withhold approval of the permits under Iowa law and the applications meet all legal requirements.

26. On July 25, 2008, the Dallas County Board of Supervisors gave a notice of intent to appeal the issuance of the draft permits and to demand a hearing before the Environmental Protection Commission.

27. On August 19, 2008, the Commission heard the appeal by Dallas County of the proposed issuance by the Department of the confinement feeding operation construction permits.

28. At the August 19, 2008, hearing the Commission voted 6-2 to reverse the Department's preliminary decision to issue the construction permits and held that no permits should be issued.

29. In a September 3, 2008 letter entitled "Denial of Application for Construction Permits" from Sara Smith, Ph.D, of the Wastewater Engineering Section, the Department stated that Petitioners' permit applications had been denied on August 19, 2008 by the Commission.

30. The September 3, 2008 letter further stated that "At its August 19, 2008, meeting, the Iowa Environmental Protection Commission heard the appeal by Dallas County of the proposed issuance of the confinement feeding operation construction permits. After reviewing the documents submitted by the parties and oral argument, the commission voted 6-2 to reverse the department's preliminary decision to issue the construction permits." The letter did not set out reasons for denial but referenced an audio disk recording of the commission hearing.

31. The Commission's decision denying the construction permits is a final agency action for and on behalf of the Department. Section 17A.15, Iowa Code.

The Director Discretion Rule is Unlawful and Void

32. Upon information and belief, Petitioners state that the Commission will state that it exercised "director discretion" under 567 IAC 65.5 in denying the construction permits.

33. On August 8, 2006, the Administrative Rules Review Committee did vote to object to the adoption of the director discretion rule at 567 IAC 65.5(3) and 65.103(5) on the grounds that they are beyond the authority delegated to the Department.

34. This objection by the Administrative Rules Review Committee ("Committee") states that "It is the opinion of the Committee that Code chapters 459 and 459A establish the procedures and standards relating to the issuance of construction permits and the approval of manure management plans, and that the Department does not have authority to create additional procedures and standards relating to the issuance of construction permits and the approval of manure management plans, and that the Department does not have authority to create additional procedures and standards by rule. The Master Matrix was created by Code section 459.305 in order . . . 'to provide a *comprehensive* [emphasis added by Committee] assessment mechanism in order to produce a statistically verifiable basis for determining whether to approve or disapprove an application for the construction, including expansion, of a confinement feeding operation structure . . .'"

35. The Committee further cited in support of its objection Section 459.305, subsection 1, paragraph "a", which further states: "The master matrix shall be used to establish conditions for the construction of a confinement feeding operation structure and for the

implementation of manure management practices, which conditions shall be included in the approval of the construction permit or the original manure management plan as applicable."

36. The Committee concluded its objection by stating: "The Committee believes the statutory language demonstrates a clear legislative intent that the matrix is the exclusive mechanism for the evaluation and approval of an application for the construction or expansion of a confinement feeding operation structure and for the implementation of manure management practices."

37. Because the Administrative Rules Review Committee filed a formal objection to the rule, pursuant to Iowa Code § 17A.4(4)(a), "The burden of proof shall then be on the agency in any proceeding for judicial review or for the enforcement of the rule heard subsequent to the filing to establish that the rule or portion of the rule timely objected to according to the above procedure is not unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to it."

38. The "Director Discretion Rule," even if valid and enforceable, does not contemplate the exercise of that discretion by the Commission.

39. The Commission may not exercise "Director Discretion" under Iowa regulations and any attempt to exercise that discretion is *ultra vires*, exceeds its jurisdiction and authority, and is void.

The Commission cannot rely upon Iowa Code 455A.2

40. Upon information and belief, Petitioners state that the Commission will argue that it exercised authority under Iowa Code 455A.2 in denying the construction permits.

41. This statute states in whole: "A department of natural resources is created which has the primary responsibility for state parks and forests, protecting the environment, and managing energy, fish, wildlife, and land and water resources in this state."

42. This statute does not provide any authority for the Commission to deny the construction permits.

The Commission's Decision is Unconstitutional

43. The denial of the construction permits by the Commission without any legal basis in statute or regulation exceeds and violates the intent of the legislature which enacted a carefully and specifically drafted statutory regime to regulate the permit application and approval process and constitutes a usurpation of power and an exercise of legislative, as opposed to executive, functions in violation of the Iowa Constitution, Article III, Of the Separation of Powers, Section 1, and Article IV, Section 9.

44. The Department has indicated in a September 3, 2008 letter that the "construction permit application fees and manure management plan filing fees are non-refundable."

45. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation, constitute a denial of due process, a deprivation of substantive due process rights, and is a taking without just compensation in violation of the United States Constitution, Amendment 4 and the Iowa Constitution, Article I, Section 18.

46. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation constitute inverse condemnation

of vested property rights in violation of the United States Constitution, Amendment 4 and the Iowa Constitution, Article I, Section 18.

47. Because the basis of the Commission's ruling is that Petitioners' operation of the confinement facility would require application of nitrogen on agricultural land, and because the prohibition of the use of fertilizer on agricultural land in the Raccoon River watershed would bar any reasonable use of such agricultural land, the denial of the construction permits by the Commission without any legal basis in statute or regulation constitutes a denial of due process, a deprivation of substantive due process rights, and is a taking without just compensation in violation of the United States Constitution, Amendment 4 and the Iowa Constitution, Article I, Section 18.

48. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation constitutes an ex post facto law prohibited by the United States Constitution, Article I, Section 10, Chapter 1, and the Iowa Constitution, Article I, Section 21.

49. The denial of the construction permits and the confiscation of application fees by the Commission is in violation of Iowa Code section 459.305 which states that it is "...to provide a *comprehensive* [emphasis in original] assessment mechanism in order to produce a statistically verifiable basis for determining whether to approve or disapprove an application for the construction, including expansion, of a confinement feeding operation structure..."

50. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation is unconstitutionally overbroad.

51. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation exceeds the jurisdiction of the Commission.

52. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation exceeded its authority and constitutes an *ultra vires* action on the part of the Commission and is void.

53. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation exceeded its authority by failing to abide by the requirements of Iowa law and applicable regulations.

54. The denial of the construction permits and the confiscation of application fees by the Commission without any legal basis in statute or regulation constitutes unequal application of law by the Department and violates Petitioners' equal protection guarantees under the United States Constitution, Amendment 14, Section 1 and the Iowa Constitution Article I, Section 6.

The Commission's Decision exceeds its Authority

55. Upon information and belief, Petitioners state that the Commission and the Department may attempt to justify the denial of the construction permits on the basis of subjective opinions, a TMDL report, uninformed political positions or agendas and other matters that are not properly before the Commission and which are not permitted to be considered by the Commission in issuing a construction permit. To the extent that the Commission did, in fact, base its decision to deny the construction permits on such matters, its decision is illegal, void, and exceeds both its jurisdiction and authority.

56. The denial of the construction permits and the confiscation of application fees by the Commission is in violation of Iowa Code section 459.305, subsection 1, paragraph a, which states: "The master matrix *shall* be used to establish conditions for the construction of a confinement feeding operation structure and for the implementation of manure management practices, which conditions shall be included in the approval of the construction permit or the original manure management plan as applicable." (emphasis added).

Additional Grounds under Iowa Code § 17A.19(10)

57. Petitioners are aggrieved and adversely affected by the Commission's final agency action for and on behalf of the Department in that its substantive rights have been prejudiced because the Commission's action is one or more of the following:

- a. Unconstitutional on its face or as applied or is based upon a provision of law or in violation of any provision of law;
- b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law;
- c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency;
- d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process;
- e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.
- f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.

- g. Action other than a rule that is inconsistent with a rule of the agency;
 - h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency;
 - i. The product of reasoning that is so illogical as to render it wholly irrational;
 - j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action;
 - k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy;
 - l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency;
 - m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency;
 - n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.
58. Petitioners have exhausted all of its administrative remedies.

RELIEF SOUGHT

59. Petitioners requests a court order providing the following:
- a. That the Commission's decision denying the construction permits is unlawful, unconstitutional, and void.

b. That the Commission's decision denying the construction permits must be remanded to the Commission with instructions to grant the construction permits.

c. That additional evidence should be presented before the Court to show that the Commission was motivated by an improper purpose, or were subject to disqualification.


d. That the "Director Discretion Rule" set out at 567 IAC 65.5 is invalid and is an unlawful exercise of authority beyond that which the legislature has delegated and is void.

e. That the Commission be enjoined from exercising the Director Discretion Rule set out at 567 IAC 65.5 in lieu of the Director of the Department.

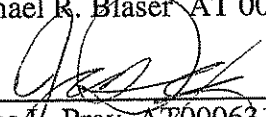
WHEREFORE, Petitioners pray this court reverse the action taken by the Commission and to remand this matter back to the agency with directions to grant Petitioners construction permits and for such other relief the court deems just and appropriate.

REQUEST FOR ORAL HEARING

Petitioners hereby respectfully request oral argument and the right to present evidence in this matter.



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